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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1993

BP NORTH AMERICA PETROLEUM, INC.,
Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackle, apparel and furniture, *in rem*;

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November, 1993

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QUESTIONS PRESENTED FOR REVIEW

I. Does a rule that requires actual ownership of damaged property as a prerequisite to recovery for related economic losses, which is in conflict with the opinions of four other federal circuits and which is far more restrictive than any standard previously announced, conflict with this Court's decision in *Robins Dry Dock & Repair Co. v. Flint*?

II. Does the Fifth Circuit's holding that it had original jurisdiction over a state law claim in which the parties were non-diverse, and over which supplemental jurisdiction was never invoked, violate the power of the federal courts and the intent of Congress expressed in 28 U.S.C. § 1367?

III. Does a rule that the Admiralty Extension Act preempts state law for shoreside injuries conflict with the intent of Congress and the decision of this Court in *Askew v. American Waterways Operators* affirming the concurrent power of states to regulate within their territorial jurisdiction?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Fifth Circuit were:

BP North America Petroleum, Inc.,[1]

The S/S ROBERT E. LEE, her engines, tackle, apparel and furniture, *in rem*,[2]

Waterman Steamship Corporation,[3]

International Shipholding Corporation,[4] and

Midland Enterprises, Inc.[5]

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[1] BP North America Petroleum, Inc. is a subsidiary of BP America which is a subsidiary of British Petroleum.

[2] The S/S ROBERT E. LEE is wholly owned by respondent Waterman Steamship Corporation.

[3] Waterman Steamship Corporation is a subsidiary of Waterman Marine Corp. which is wholly owned by International Shipholding Corporation.

[4] International Shipholding Corporation's subsidiaries are: Central Gulf Lines, Inc.; St. Rose Fleeting Company Inc.; Johnsen NW & Company; LCI Shipholdings, Inc.; Adrian Shipping (Bermuda) Ltd.; Bay Insurance Company; Netherlands Maritime Agencies; Material Transfer, Inc.; Forest Lines, Inc; Cypress Auto Carriers, Inc.; Lash Marine Services, Inc.; Allied Ocean Carriers, Inc.; Sulphur Carriers, Inc.; and Waterman Marine Corp.

[5] Our research revealed no parent or subsidiary corporations for Midland Enterprises, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BP North America Petroleum, Inc., petitioner, hereby petitions this Court to issue a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered on June 25, 1993 and August 16, 1993.

OPINIONS BELOW

The opinions below are contained in the appendices to the Petition. Appendix "A" is the decision of the Court of Appeals for the Fifth Circuit rendered on June 25, 1993. Appendix "B" is the denial by the Court of Appeals for the Fifth Circuit of petitioner's Petition for Rehearing which was entered on August 16, 1993. Appendix "C" is the judgment of the Court of Appeals denying petitioner's Motion for Partial Dismissal Without Prejudice also entered on August 16, 1993. Appendix "D" is the Opinion of the District Court dated September 28, 1992. Appendix "E" is the judgment entered by the United States District Court for the Eastern District of Louisiana dated October 7, 1992.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 25, 1993, and rehearing was denied on August 16, 1993. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following statutes, set forth in Appendices "F" and "G", are involved in this case:

28 U.S.C. § 1367

46 U.S.C. § 740

STATEMENT OF THE CASE

Course of Proceedings Below:

BP North America Petroleum, Inc. ("BP NAP") sued for the loss of use of its leased storage tanks, dedicated pipeline and preferred berth as well as for accompanying economic damages which resulted when the S/S ROBERT E. LEE allided with and damaged an oil storage facility where BP NAP was a lessee. At the trial court level, defendants Waterman Steamship Corporation ("Waterman"), International Shipholding Corporation ("ISC"), the S/S ROBERT E. LEE, and third-party defendant Midland Enterprises, Inc. ("Midland") moved for summary judgment alleging that, because BP NAP was a lessee, rather than an actual owner of the damaged facility, BP NAP's cause of action was precluded under *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 47 S.Ct. 134, 72 L.Ed. 290 (1927). BP NAP opposed those motions and demonstrated its proprietary interest in the facility under *Robins Dry Dock* and *Louisiana Ex-Rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). Additionally, BP NAP asserted that it was standing in the place of the property owner to assert those losses which were shifted to BP NAP and, therefore, *Robins Dry Dock* was inapplicable on its facts.

BP NAP also argued that its free-standing state law claim, brought under the federal court's diversity jurisdiction, was not preempted by the general maritime law because it was the intent of Congress, under the Admiralty Extension Act, to allow concurrent state and federal

jurisdiction over shoreside damages. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1972), *reh. denied*, 412 U.S. 933, 93 S.Ct. 2746, 37 L.Ed.2d 162 (1973).

The trial Court misinterpreted *Robins Dry Dock* to say only an owner of damaged property could recover under maritime law for lost use and economic losses associated with that property damage. It redefined "proprietary interest" (its previous requirement for recovery set out in *TESTBANK*) as outright ownership.

Regarding BP NAP's state law claims, the district court held that the Admiralty Extension Act made this a purely maritime action and ruled that the maritime law completely preempted Article 2703 of the Louisiana Civil Code for BP NAP's shoreside injuries. The district court held that there was no concurrent state and federal maritime jurisdiction for shoreside injuries notwithstanding this court's holding to the contrary in *Askew*.

BP NAP appealed the lower court's decisions and the Fifth Circuit affirmed. *IMTT Gretna v. ROBERT E. LEE SS, et al.*, 993 F.2d 1193 (5th Cir. 1993). The circuit court adopted the new definition of proprietary interest incorrectly stating that *Robins Dry Dock* "serves as notice to non-owners that they cannot claim damages in maritime collisions." 993 F.2d. at 1194. The circuit court also summarily held that maritime law preempts the separate state law claim for shoreside damages without considering *Askew*. BP NAP petitioned the circuit for a rehearing but that petition was denied.

A separate issue arose at the appellate level when BP NAP moved the circuit court for dismissal of its state law claims when it was discovered that diversity did not exist. BP NAP had initially brought its state law claim as a separate and independent action in federal court based upon its belief that diversity of citizenship existed between itself and the defendants.[6] ISC had failed to inform BP NAP, the lower court, or the circuit court of the lack of diversity jurisdiction over the state law claim. Subject matter jurisdiction based on diversity of citizenship may be challenged at any time in the proceedings and whenever it is discovered that the parties are not diverse, the claim should be dismissed. Fed. Rule Civ. P. 12(h)(3).

When addressing whether it possessed subject matter jurisdiction over BP NAP's state law cause of action, the circuit court ignored the fact that BP NAP had brought two separate and independent causes of action in federal court, one asserting state law claims in diversity and the other asserting claims under the Admiralty Extension Act. In BP NAP's federal action, no state law issues were raised, pleaded nor contested. In BP NAP's independent, free-standing state law action, no issues of maritime law were raised, pleaded, nor contested. BP NAP brought no state law claims pendent or supplemental to its federal maritime cause of action and never invoked the district court's supplemental jurisdiction.

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[6] After the appeal it was found that both BP NAP and defendant International Shipholding Corporation (hereinafter "ISC") are corporations organized under the laws of the State of Delaware, when the information was filed with the office of the Louisiana Secretary of State by ISC in 1993. Although ISC later contended it was confused as to which ISC corporation had been sued, BP NAP's complaint clearly identified ISC with the incident involving the ROBERT E. LEE. Only the ISC Delaware Corporation had any connection with the ROBERT E. LEE.

The Fifth Circuit simply stated in a conclusory manner that it had maritime jurisdiction over the entire case because it arose out of a single incident on navigable waters. *IMTT Gretna v. ROBERT E. LEE SS,* 993 F.2d at 1195. Neither the circuit court nor the district court ever reached the merits of BP NAP's state law claims for interference with a lessee's rights.

In response to these decisions, BP NAP files this Petition for a Writ of Certiorari to review the circuit court's opinions.

REASONS FOR GRANTING THE WRIT

First, the Court should issue a writ of certiorari to reverse the Fifth Circuit's decision which redefines the term "proprietary interest" to require actual ownership of damaged property as a prerequisite for recovery under *TESTBANK,* a holding which conflicts with four other federal circuits and this Court's decision in *Robins Dry Dock*, and which acts to forfeit valid proprietary rights.

Second, the Fifth Circuit refused to acknowledge that the only possible source of subject matter jurisdiction over the state law claim arises under 28 U.S.C. § 1367. This statute may provide supplemental jurisdiction over state law claims only when invoked by a plaintiff in federal court along with a related federal claim. Because plaintiff did not invoke supplemental jurisdiction, the court should not have assumed it. Even if it would be proper to assume supplemental jurisdiction *sua sponte,* the Fifth Circuit

stated essentially that it did not need to consider supplemental jurisdiction and incorrectly refused to undertake the analysis required by 28 U.S.C. § 1367(c). Recognition of the statute as the source of subject matter jurisdiction and proper analysis would have led inescapably to the conclusion that the state cause of action should be dismissed upon dismissal of the federal cause of action.

Even if the Fifth Circuit could be said to have properly retained jurisdiction over the state law claim, a separate and independent reason for reviewing the court of appeal's decision is the court's incorrect and expansive finding that BP NAP's state law claim was preempted by general maritime law, which is directly contrary to the intent of Congress as recognized in this Court's decision in *Askew*. According to the circuit court's decision, state law is preempted even in a maritime action brought under the Admiralty Extension Act, notwithstanding this Court's explicit pronouncement in *Askew* that a state retains concurrent jurisdiction over shoreside injuries caused by vessels in navigable waters.

I. The Circuit Court's Decision Requiring Actual Ownership of Damaged Property As A Prerequisite to Recovery For Economic Losses Is Contrary to *Robins Dry Dock* And Its Progeny.

A. The Fifth Circuit Incorrectly Interpreted *Robins Dry Dock*.

The circuit court has seriously misread *Robins Dry Dock* to require actual ownership of damaged property as a prerequisite to recovery for consequent economic losses. That holding undermines the rationale in both *Robins Dry*

Dock and *TESTBANK* which sought only to limit unforeseeable and unlimited classes of plaintiffs asserting likewise unlimited damages.

Whereas the holding in *TESTBANK* established a harsh but predictable rule requiring a proprietary interest in property for recovery of economic damages, the circuit court's new edict brutally forfeits proprietary leasehold rights. The holding below essentially extinguished all economic loss and loss of use rights because those rights had been contractually shifted from the owner to BP NAP.

The Court in *Robins Dry Dock* held that a contract alone cannot create a right in a third party to recover for another's negligence; the circuit court's opinion turns that decision on its head by holding that a contract which shifts the risk of loss extinguishes a primary property right by forfeiting any claims for lost use or economic losses.

B. This Fifth Circuit Decision Creates A Serious Conflict Between Circuits And With Maritime Tort Statutes.

This completely new and severely restrictive standard changes the face of admiralty law in the Fifth Circuit and sharpens the conflict between the Fifth Circuit's position and those held by the Second, Fourth, Sixth and Ninth Federal Circuit Courts.

In *Petitions of the Kinsman Transit Company,* 388 F.2d 821 (2d Cir. 1968), the Second Circuit rejected the theory later expressed in *TESTBANK* which prohibits recovery of economic losses absent a proprietary interest in

damaged property. Instead, the *Kinsman* court looked to traditional tort criteria of foreseeability, proximate cause, remoteness, duty, etc., to determine whether a vessel owner was liable for economic losses arising from a blocked river.

The Fourth Circuit Court of Appeals, in *Venore Transportation Company v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), allowed economic loss recovery for a time charterer. The plaintiff time charterer in *Robins Dry Dock* was not required to pay charter hire and, therefore, this Court held that the negligent party had no liability to the time charterer who merely suffered a contractually based loss. In contrast, in *Venore* and in the present case, the charterer/lessee was required to make payments under the terms of the charter/lease agreement while the damaged property was being repaired.

The Sixth Circuit also looks to principles of foreseeability and proximate cause when determining whether a party should recover for economic losses. In *In Re: Bethlehem Steel Corporation*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the Sixth Circuit concluded that "there is no absolute rule either in Canada or the United States which forbids recovery for economic loss where the claimant has suffered no physical injury." 631 F.2d at 448. Rather than applying the proprietary interest rule espoused by the Fifth Circuit, the Sixth Circuit expressly adopted the *Kinsman* approach and limited recovery for pure economic loss to that which is direct and not too attenuated a consequence of the defendant's negligence.

Finally, the Ninth Circuit Court of Appeals in

Benefiel v. Exxon Corporation, 959 F.2d 805 (9th Cir. 1992), also looked to issues of foreseeability and proximate cause to dismiss the plaintiffs' claims. That court invoked the *Kinsman* analysis in determining whether the plaintiffs could recover for purely economic losses.[7] The federal district court in that case dismissed the plaintiffs' claims based on *Robins Dry Dock* and the Ninth Circuit affirmed, not on the ground of lack of proprietary interest, but rather on grounds of foreseeability and proximate cause.

The *TESTBANK* court stated that: "Indeed the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct." 752 F.2d at 1032. There is no longer any uniformity in this area of general maritime law. Not only does the Fifth Circuit's incorrect reading of *Robins Dry Dock* — which also restricts *TESTBANK* far past the bright-line rule of proprietary interest established by that *en banc* decision — conflict with the above circuit courts, it also conflicts with specific provisions in the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(4). All of these statutory provisions allow maritime tort victims to recover for loss of profits or impairment of earning capacity due to the injury, destruction or loss or real property, personal property, or natural resources even if these par-

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[7] It should be noted that the *Benefiel* claim also dealt with the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(1).

ties did not own the damaged property or resources.[8]

Additionally, most courts that apply the proprietary interest rule recognize exceptions where the rule creates a harsh result. These exceptions began with *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), where the Ninth Circuit held that fishermen and seamen could recover lost profits arising from the reduction in commercial fishing potential of an area damaged by oil pollution. *Id.* at 560. In granting this recovery to commercial fishermen, the *Oppen* court looked to duty, proximate cause and foreseeability. The Fifth Circuit adopted that exception when it formulated the rule in *TESTBANK*.

C. Redefining "Proprietary Interest" To Require Actual Ownership Of Property Widens The Gulf Between The Fifth and Other Circuits.

Prior to the decision in the case at bar, the Fifth Circuit repeatedly looked to a party's possession and control of property, as opposed to its ownership, to determine whether a party could recover. In *Louisville & N.R. Co. v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979), in *Texas Eastern Trans. v. McMoRan Offshore Explor.*, 877 F.2d 1214 (5th Cir. 1989), *cert. denied*, 493 U.S. 937, 110 S.Ct. 332, 107 L.Ed.2d 321 (1989), and in *Amoco Transport Co. v. S/S MASON LYKES*, 768 F.2d 659 (5th Cir. 1985), the Fifth Circuit always examined the nature of a non-owner's interest in damaged property to determine

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[8] *See* Sturla Olsen, Comment, *Recovery for the Lost Use of Water Resources:* M/V TESTBANK *On The Rocks?*, 67 Tul.L.Rev. 271, 284-303, (1992).

whether those non-owners could recover for lost use and economic losses. The Fifth Circuit sought to allow recovery for claimants closely related to the property owner or situated in a position similar to that of the property owner, while cutting off an unforeseeable and unlimited number of potential plaintiffs.

Now the Fifth Circuit simply asks who was the actual owner of the damaged property. This is in contravention of the spirit and policy of both *Robins Dry Dock* and *TESTBANK*; even the majority of the Fifth Circuit judges sitting *en banc* in *TESTBANK* were uncomfortable with the restrictiveness of the "proprietary interest" rule espoused in that case. As Judge Rubin's dissent noted, "in fact a majority of the court is unwilling to impose an unqualified requirement of physical injury to a proprietary interest." *TESTBANK*, 752 F.2d at 1053.

While uncomfortable with the "proprietary interest" standard, the majority of the *TESTBANK* court felt that it was an artificial but pragmatic method of limiting recovery for large and reverberating injuries, the sheer volume of which would strain the courts' limits of adjudication. *See* 752 F.2d at 1029, n.12; 752 F.2d 1032 (Gee, J., and Clark, C.J., *concurring*).

No other circuit court has held that ownership is an absolute prerequisite to recovery under *Robins Dry Dock*. The district court in this case began the detour from established jurisprudence when it improperly relied on the dicta in *Naviera Maersk Espana, J.A. v. Cho-Me Towing, Inc.*, 782 F. Supp. 317, 320 (E.D. La. 1992) to hold: " 'Proprietary Interest' typically equates to ownership." The

district court in *Naviera* was beginning to step off track when it misinterpreted Fifth Circuit precedent in *Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980). That case held that if one is in fact an owner, then the proprietary interest analysis is moot and the injured party may recover. Conversely, if the injured party is not an owner, then the *Robins Dry Dock/TESTBANK* analysis becomes activated and courts then examine how similar the injured party's interests are to those of the actual property owner. *See Id.*

The circuit court's holding plainly turned on the fact that BP NAP did not own the damaged facility. In its first opinion the circuit court held that: "This bright-line rule serves as notice to non-owners that they cannot claim damages in maritime collisions." *IMTT Gretna v. ROBERT E. LEE*, 993 F.2d at 1194. Then, in its denial of BP NAP's petition for rehearing, the court reaffirmed that only owners of damaged property, and not lessees, could recover for associated economic losses and lost use.

II. The Circuit Court Incorrectly Assumed That Federal Courts Have the Power, Absent Diversity Jurisdiction And Without Invocation Of Supplemental Jurisdiction, To Adjudicate State Law Claims.

A. BP NAP Did Not Bring A Claim Under The Supplemental Jurisdiction Statute.

It was solely BP NAP's prerogative to ask the district court to exercise supplemental jurisdiction over its

related state law claims. The supplemental jurisdiction statute[9] codifies the case law doctrines of pendent and ancillary jurisdiction.[10] Both pendent and ancillary jurisdiction are bases on which *a party asserting a claim* could ask the court to also adjudicate a related cause of action over which the court had no independent basis of jurisdiction. *See Id.* Therefore, the party against whom the cause of action is being asserted cannot force or compel the asserting party to bring its state claim in federal court.

Cases prior to the enactment of § 1367 interpreting pendent jurisdiction note that it allows the original plaintiff to assert a related state law claim against the original defendant. *Federman v. Empire Fire & Marine Insurance*

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[9] § 1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

....

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) The district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

....

[10] David D. Siegel, *Practice Commentary*, appended to 28 U.S.C.A. § 1367.

Co., 597 F.2d 798 (2d Cir. 1979). A pendent claim is a cause of action without an independent basis, brought by a party who is also asserting a substantial federal claim. *Harris v. Steinem*, 571 F.2d 119, 122 n.7 (2d Cir. 1978). The Fifth Circuit held that pendent jurisdiction "is predicated on the assumption that the *plaintiff* invokes the court's jurisdiction." *Ruiz v. Estelle*, 679 F.2d 1115, 1157, *vacated in part* 688 F.2d 266 (5th Cir. 1982) (emphasis added). "The plaintiffs are the masters of their own pleadings, it is their pleadings... which determine the nature of their complaint." *Carolina Aircraft Corporation v. American Mutual Liberty Ins. Co.*, 517 F.2d 1076 (5th Cir. 1975).

BP NAP never invoked the federal court's supplemental jurisdiction. Its state law claim was specifically identified as based upon diversity. Therefore, the circuit court should have recognized that it was without subject matter jurisdiction and dismissed the state law claim, without prejudice, upon receiving notice that defendant ISC had failed to disclose facts which defeated diversity jurisdiction.

B. The Fifth Circuit Declined to Exercise Supplemental Jurisdiction.

Even if the circuit court had the power, *sua sponte*, to assume supplemental jurisdiction, it did not do so, but erroneously concluded that its maritime jurisdiction provided grounds for ruling on the separate state law claims. "In 1807, Chief Justice Marshall wrote for the Court that 'Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.' " *Finley v. United States*, 490 U.S. 545,

547, 109 S.Ct. 2003, 2006, 104 L.Ed.2d 593 (1989) (quoting *ex-parte Bollman*, 4 Cranch 75, 93, 2 L.Ed. 544 (1807)). Merely because BP NAP's state law claim was factually related to the maritime claim, the federal court held that it automatically had subject matter jurisdiction over the state law claim.

If a federal court has subject matter jurisdiction over some of the claims asserted, it may have supplemental jurisdiction over certain related state law claims, even though it would not otherwise have jurisdiction to determine the state claims. However, the factors of convenience and judicial economy which gave rise to the doctrine of pendent jurisdiction do not completely override the federal court's limits of jurisdiction. 28 U.S.C. § 1367(c) sets out guidelines for the determination of whether the federal court should exercise its discretion to decline to hear supplemental claims. While a federal court has discretion to determine state law issues brought under supplemental jurisdiction, it does not have discretion to completly ignore the statute.

Otherwise, there would be no need for supplemental jurisdiction. All claims that have any factual relationship to a federal claim would automatically become federal claims notwithstanding their state law basis. There must be both proper invocation of § 1367 and some method to review that invocation to determine whether a party's potentially pendent state law claims are properly in federal court. The Fifth Circuit ignored both the proper statutory procedure and its own constitutional limitations by simply asserting that it had power to review BP NAP's state law claims.

C. If The Circuit Court Had Based Subject Matter Jurisdiction Over the State Law Claim On Supplemental Jurisdiction, It Should Have Dismissed The State Law Claim Without Prejudice Or Remanded The Case For Determination Of Supplemental Jurisdiction Factors.

The district court, as warranted by the pleadings at that time, believed that it had valid diversity jurisdiction over the plaintiff's state law claim. As such, the district court never considered whether it should have exercised supplemental jurisdiction in this case. Therefore, the circuit court had no basis or record on which to review this issue and should have dismissed the state law claim without prejudice.

Alternatively, if supplemental jurisdiction may have been proper in this case, which BP NAP denies, then the district court should be given the opportunity to decide whether such jurisdiction would have been proper. In *Growth Horizons, Inc. v. Delaware County, PA*, 983 F.2d 1277, 1284 (3d Cir. 1993), the Third Circuit remanded a similar case so that the district court could decide on its own whether to adjudicate the claim or dismiss it without prejudice. The Fifth Circuit should have remanded this case to the district court if it thought there was a ground for invoking supplemental jurisdiction, rather than arbitrarily casting aside procedural requirements.

The cases speak "with a single voice on what a court is to do with pendent state law claims when the litigant's federal cause of action has been dismissed at a preliminary

stage." *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1318 (5th Cir. 1983) (citing eleven cases).[11]

In the case at hand, the district court dismissed BP NAP's federal claim on a motion for summary judgment. Therefore, due to the early stage of the litigation, the circuit court should have dismissed the state law claim without prejudice.

Other factors also favor declination of supplemental jurisdiction here. BP NAP is able to bring its claims in Louisiana state court and as such, there is no compelling reason for the federal court to adjudicate the claim. BP NAP's cause of action under Louisiana state law is based on the Louisiana Civil Code and the state courts of Louisiana are far better suited to adjudicate that claim. Important issues of state law should be left to the courts of that state. *Port Allen Marine Serv. v. Chotin*, 765 F. Supp. 887 (M.D. La. 1991).

It would be improper to attempt to "cure" the Court's lack of jurisdiction by declaring BP NAP's entire state law cause of action retroactively "supplemental" to

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[11] The practice notes appended to the supplemental jurisdiction statute state that "whether a dismissal of the touchstone claim should bring about a dismissal... of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place, and on the other surrounding circumstances. If, for example, the main claim is dismissed early in the action, before any substantial preparation has gone into the dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough." David D. Siegel, *Practice Commentary*, appended to 28 U.S.C. § 1367. *See La Porte Const. Co., Inc. v. Bayshore Nat. Bank*, 805 F.2d 1254 (5th Cir. 1986).

BP NAP's separate and independent general maritime law cause of action. Even if supplemental jurisdiction could have been assumed by the circuit court, it was not, and the required statutory analysis was not performed. Therefore, the decision of the Fifth Circuit should be reversed and the state law claim should be dismissed without prejudice. Alternatively, the case should be remanded for determination of the factors to be considered in exercising supplemental jurisdiction.

III. The Circuit Court's Opinion Directly Conflicts With This Court's Holding In *Askew* That Congress Did Not Intend For The Admiralty Extension Act To Preempt State Law For Sea-To-Shore Injuries.

Even if the circuit court could be said to have properly exercised jurisdiction in this matter, BP NAP's state law claims — which were independent free-standing claims based on diversity jurisdiction — should have been allowed to proceed notwithstanding any alleged conflict with maritime law.

Absent the Admiralty Extension Act, there would be no maritime jurisdiction over this action. *Victory Carriers v. Law,* 404 U.S. 202, 206, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971). "[A]ccidents on land were not within the maritime jurisdiction as historically construed by this Court. Piers and docks were consistently deemed extensions of land; injuries inflicted to or on them were held not compensable under the maritime law." *Id.*, 404 U.S. at 207.

The Fifth Circuit confused general maritime law

with the Admiralty Extension Act. It is true that general maritime law can preempt conflicting state law where there is general maritime jurisdiction pursuant to the United States Constitution. It is not true to say that a federal statute extending maritime jurisdiction to shoreside injuries preempts state law to the same extent. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1972), *reh. denied*, 412 U.S. 933, 93 S.Ct. 2746, 37 L.Ed.2d 162 (1973). In *Askew*, this Court addressed that precise issue and held that the Admiralty Extension Act does not preempt state law for shoreside injuries: "[W]e decline to move the [preemption] line of cases shoreward to oust state law from any situtations involving shoreside injuries by ships on navigable waters. *The Admiralty Extension Act does not preempt state law in those situations.*" 411 U.S. at 344 (citations omitted) (emphasis added).

This Court recognized that the Admiralty Extension Act was designed by Congress to give a maritime remedy to parties injured by ships. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969). However, the Court specifically held that Congress had no intention under that protectionist statute to preempt or displace state law remedies or state law jurisdiction for shoreside injuries. *Askew*, 411 U.S. at 344.

Therefore, the circuit court's decision preempting the Louisiana Civil Code on the ground that it is displaced by admiralty law is in direct conflict with this Court's decisions in *Askew* and *Nacirema*. Moreover, the intrusive impact of this decision on a state's ability to regulate and protect its shoreside interests is unwarranted by the statute

and conflicts with *Finley* and with congressional and judicial trends to extend the power of states over areas traditionally under maritime law's jurisdiction such as oyster beds and other natural resources.[12]

CONCLUSION

This case involves a drastic restriction of prior case law at a time when admiralty has been moving uniformly toward modern tort principles of foreseeability and proximate cause.

First, the circuit court misread this Court's precedent in *Robins Dry Dock* as requiring actual ownership of property, thus extinguishing property rights when they are contractually shifted to a non-owner. Whereas the Fifth Circuit's holding in *TESTBANK* conflicts with the test for recovery in four other circuits, the present decision strips away any veneer of reasonableness by forfeiting valid proprietary rights.

Second, the circuit court improperly assumed that it had jurisdiction over a state law claim merely because it was factually related to a federal maritime claim. The circuit court's overreaching of its constitutional powers both vitiates the need for supplemental jurisdiction and federalizes all state law claims if they have any federal nexus whatsoever.

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[12] *See, e.g.*, the Oil Pollution Act, 33 U.S.C. § 2701, *et seq.* This statute specifically preserves state law causes of action in addition to setting out federal remedies.

Third, the circuit court wrongfully held that its unwarranted restriction of *Robins Dry Dock* also preempts a state law cause of action for shoreside damages. It ignored this Court's directive that there is no evidence of congressional intent under the Admiralty Extension Act to displace state law for shoreside injuries caused by a vessel in navigable waters.

Petitioner respectfully requests that this Court grant this petiton for a writ of certiorari to review the Fifth Circuit's incorrect interpretation of *Robins Dry Dock* which creates a serious conflict among the circuits, its determination of a state law claim without invoking supplemental jurisdiction, and its violation of states' rights by improperly expanding the admiralty preemption doctrine.

Respectfully submitted,

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APPENDIX A

IMTT-GRETNA, Plaintiff,

v.

ROBERT E. LEE SS, etc., et al., Defendants.

BP NORTH AMERICA PETROLEUM, INC., Plaintiff-Appellant,

v.

The ROBERT E. LEE SS, her engines, tackle, apparel and furniture, in rem; Waterman Steamship Corporation, et al., Defendants-Appellees,

and

Midland Enterprises, Inc., in personam, Third Party Defendant-Appellee.

No. 92-3943

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 25, 1993.

Lessee of dock brought action against vessel owner, seeking to recover economic damages after dock was damaged in collision. The United States District Court for the Eastern District of Louisisna, Adrian G. Duplantier, J.,

entered summary judgment in favor of owner, and lessee appealed. The Court of Appeals, Reynaldo G. Garza, Circuit Judge, held that: (1) lessee did not have sufficient proprietary interest in dock to recover economic damages from owner, and (2) admiralty law preempted lessee's state law causes of action against owner.

Affirmed.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before REYNALDO G. GARZA, SMITH and WIENER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

BP North America Petroleum ("BP NAP"), the appellant, sued for economic damages because it was unable to use a leased berth due to a collision. The district court granted summary judgment in favor of appellees SS Robert E. Lee ("SS Lee"), Waterman Steamship Corporation ("Waterman"), International Shipholding Corporation ("ISC") and Midland Enterprises, Inc., ("Midland"). Upon review, we affirm the summary judgment.

FACTS

On January 24, 1991, the SS Lee left New Orleans and proceeded upriver so that it could turn around in a wider area. It collided with the International Matex Tank Terminal ("IMTT")—Gretna dock facility near the Mile 97

area of the Mississippi River as it was executing this U-turn on its way downriver. The dock did not become fully operational for four months. IMTT—Gretna sued the SS Lee and its owner and operator, Waterman and ISC. The defendants in turn filed a third party claim against Midland, the owner of the MV Gayle. The defendants claimed that the actions of the MV Gayle contributed to the collision. Midland cross-claimed against Waterman seeking indemnification and contribution.

That suit was combined with the instant claim of BP NAP, a lessee of part of the dock facilities. IMTT—GRETNA eventually settled with the original defendants. The defendants all submitted motions for summary judgment against the remaining claim of BP NAP. The district court granted summary judgment in favor of the defendants due to BP NAP's lack of a proprietary interest. The district court further ruled that maritime law preempted any remaining state claim. The claims against all defendants, including third-party defendant Midland, were dismissed on October 7, 1992. BP NAP filed a timely appeal on November 2, 1992.

ANALYSIS

I. *Propriety Interest Necessary*

The district court correctly granted summary judgment in favor of defendants because of the appellant's lack of a proprietary interest. The long established requirement of ownership in order to validly claim against a tortfeasor in admiralty was clearly enunciated by Justice Holmes in *Robins Drydock & Repair Co. v. Flint,* 275 U.S. 303

307-9, 48 S.Ct. 184, 134-5, 72 L.Ed. 290 (1927). A tortfeasor is liable only to the owner of the dock and he has no responsibility to a third party lessee. This policy was put in place to prevent numerous claims of economic damage from parties the tortfeasor did not know he owed any duty to. "[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." *id.* at 309, 48 S.Ct. at 135. The SS Lee did not know of any contracts the owner, IMTT—Gretna, might have had. The dock owner was the only one who suffered any physical damage. The BP NAP claim is solely for economic damages due to its inability to use the berth it had leased from the owner.

The Fifth Circuit adhered to the Supreme Court ruling in its en banc opinion in *Louisiana ex rel, Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985), *cert. denied,* 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). "This circuit has consistently refused to allow recovery for economic loss absent physical damage to a proprietary interest." *Id.,* 752 F.2d at 1024. "In conclusion, having reexamined the history and central purpose of the doctrine of *Robins Dry Dock* as developed in this circuit, we remain committed to its teaching." *Id.,* 752 F.2d at 1032. This bright line rule serves as notice to non owners that they cannot claim damages in maritime collisions. "Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful." *Id.*

The appellant, fully appreciating the roadblocks set

by *Robins* and *Testbank*, argues at length that it has a proprietary interest in the dock. BB NAF argues that only their products were allowed in the pipelines they leased and that they had preferential docking rights at the damaged berth. The Fifth Circuit states that the requirements for proprietary interest are actual possession or control, responsibility for repair and responsibility for maintenance. *Texas Eastern Trans. v. McMoran Offshore Explor.*, 877 F.2d 1214, 1225 (5th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 332, 107 L.Ed.2d 321 (1989). BP NAP fails to meet any of the criteria. It certainly did not own any of the property and IMTT—Gretna maintained the right to refuse BP NAP access to the leased pipelines if it felt that the liquids being pumped could be harmful to others or to the pipeline. The appellant's use of the dock and pipelines was valid only for the term of the lease. BP NAP did not have control of the property. It did not repair or had the responsibility to repair the damage. It did not station any employees at the dock so it clearly did not maintain the facility. The district court correctly found that no issue of proprietary interest existed that could have prevented the granting of summary judgment against BP NAP.

II. *Maritime Law Preempts State Cause of Action*

The appellant argues that they can still sue for economic damages in state court separate from admiralty law. We disagree. Maritime law must maintain its uniformity and it preempts state law when it is contradictory to maritime law's purpose. *J. Ray McDermott & Co., Inc. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.)(en banc), *cert. denied*, 409 U.S. 948, 93 S.Ct. 271, 34 L.Ed.2d 218 (1972). The court stated:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an Act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

Id., 457 F.2d at 818. Maritime law specifically denies recovery to non proprietors for economic damages. To allow state law to supply a remedy when one is denied in admiralty would serve only to circumvent the maritime law's jurisdiction. The Fifth Circuit stated in *Testbank:*

> Indeed the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. The *Robins* rule has proved to be a workable and useful tool in our maritime jurisprudence. To permit recovery here on state law grounds would undermine the principles we seek to preserve today.

Id., 752 F.2d at 1032. Therefore, state law does not supply an alternative remedy to BP NAP when its claim was already denied in its proper maritime jurisdiction.

CONCLUSION

We find that there exists no triable issues that would invalidate summary judgment for the appellees. For the above stated reasons, we

AFFIRM.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3943

IMTT—GRETNA,

Plaintiff,

versus

ROBERT E. LEE SS, ETC., ET AL.,

Defendants.

****

FILED
AUG 16, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Plaintiff-Appellant,

versus

The ROBERT E. LEE SS, her engines, tackle, apparel and furniture, in rem; WATERMAN STEAMSHIP CORPORATION, ET AL.,

Defendants-Appellees,

and

MIDLAND ENTERPRISES, INC.,
in personam,

Third Party Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 16, 1993)

Before REYNALDO G. GARZA, SMITH and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/Reynaldo G. Garza
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3943
Summary Calendar

(CA92-174-H/CA92-295-H)

BP NORTH AMERICA PETROLEUM, INC.,
Plaintiff-Appellant,

VERSUS

SS ROBERT E. LEE, ETC. ET AL.,
Defendants-Appellees.

FILED
AUG 16 1993

Appeal from the United States District Court
For the Eastern District of Louisiana

Partial Motion To Dismiss

(August 16, 1993)

Before REYNALDO G. GARZA, SMITH and WIENER, Circuit Judges.

PER CURIAM:

We previously ruled in the above case that the

district court's summary judgment in favor of the appellees was in all respects proper. *See IMTT-Gretna v. Robert E. Lee SS,* 993 F.2d 1193 (5th Cir. 1993). The appellant now contends that its state law claims somehow survived our prior ruling because we did not have jurisdiction to entertain them. Consequently, they seek a partial dismissal without prejudice as to the state law claims.

The appellant had brought suit alleging general maritime and state law tort claims. We held that the appellant's maritime claims were barred by the *Robins Dry Dock* doctrine, which precludes recovery for non-owners in maritime collisions. Further, we held that appellant's state law claims were preempted by general maritime law.

The appellant contends that the state law claim was an entirely separate suit from the general maritime claim and that the sole jurisdictional basis of the state law claim hinged upon diversity of the parties. The appellant now argues that the defendants are not entirely diverse and, thus, there was no independent ground of jurisdiction for the state law claim.

The appellant asserts that without an independent basis of jurisdiction, the court could only exercise supplemental jurisdiction over the state law claims. Further, the appellant argues that there was no proper exercise of supplemental jurisdiction in the present case.

Appellant's argument is unpersuasive. This case unmistakably arose out of one single incident - the collision of the SS Robert E. Lee with a barge moored on the Mississippi River. Because the accident occurred in navigable waters

of the United States, the court below properly had jurisdiction over the entire matter by virtue of the general maritime claims.

> If a claim based upon a maritime tort is asserted in a suit brought under the admiralty jurisdiction of the federal district courts, . . . the fact that diversity jurisdiction also can be alleged as a basis of subject matter jurisdiction is of no moment. Moreover, both the procedural aspects and the substantive features of a maritime tort action under federal admiralty jurisdiction will be governed by federal law.

Charles A. Wright et al., *Federal Practice and Procedure* § 3676 (Supp. 1993) (footnotes omitted); see also *Parker v. Gulf City Fisheries Inc.* 803 F.2d 828, 829 (5th Cir. 1993) (as with other questions of subject matter jurisdiction, if "the factual findings regarding subject matter jurisdiction are intertwined with the merits, "jurisdiction will be assumed unless the maritime basis for the claim is "immaterial or is wholly insubstantial and frivolous").

In the case at bar, we have determined that the state law claims are preempted. We clearly had federal subject matter jurisidiction over the entire incident as a consequence of general maritime law. The maritime claims are certainly not frivolous or insignificant - they form the crux of the controversy. The presence or absence of diversity jurisdiction in the present case is irrelevant to our court's subject matter jurisdiction. Therefore, the appellant's

attempt to obtain a second bite in a state forum will be

DENIED.[1]

[1] In a separate order today we also dismiss appellant's motion for rehearing.

APPENDIX D

MINUTE ENTRY
DUPLANTIER, J.
SEPTEMBER 28, 1992

FILED
SEP 28 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISISNA

BP NORTH AMERICA PETROLEUM, INC. — CIVIL ACTION

VERSUS — NO. 92-0174
C/W 92-0295

THE S/S ROBERT E. LEE, her engins, tackle, apparel, and furniture, *in rem*
WATERMAN STEAMSHIP CORPORATION and INTERNATIONAL SHIPHOLDING CORPORATION, *in personam* — SECTION "H"

For the following reasons, the motion for summary judgment filed on behalf of defendants, Waterman Steamship Corporation and International Shipholding Corporation, and third-party defendant, Midland Enterprises, Inc., is GRANTED

The vessel, ROBERT E. LEE, owned and operated

DATE OF ENTRY SEP 28 1992

by Waterman and International, struck part of the dock area at a petroleum storage facility owned by International Matex Tank Terminal (IMTT).

IMTT brought suit against Waterman and International to recover for the damage to the docking facility. BP-NAP, a lessee of part of the docking facility, filed a separate suit against the same defendants to recover the value of loss of use of the facility and its lost profits pursuant to the general maritime law and state law. Waterman filed a third-party claim against Midland, the owner and operator of the M/V GAYLE B, for contribution and indemnity, claiming that the M/V GAYLE B embarrassed the navigation of the S/S ROBERT E. LEE and thus contributed to the allision. The suits filed by IMTT and BP-NAP were consolidated. IMTT settled its claim and assigned its interest to Waterman. Only BP-NAP's claim against Waterman and International and the third-party claim against Midland remain.

The parties do not dispute the court's admiralty jurisdiction nor that the parties are diverse in citizenship. The motion for summary judgment is based upon defendants' contention that BP-NAP cannot recover under general maritime law for its economic losses and that the general maritime law precludes plaintiff's state law claim.

Admiralty

The Supreme Court and the Fifth Circuit have fashioned a "bright line" rule as to who may recover for economic losses under general maritime law. *See Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 48 S. Ct. 134

(1927); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (1985). To recover, the plaintiff must have a "proprietary interest" in the property. "Proprietary interest" typically equates to ownership. *See Naviera Maersk Espana, S.A. v. Cho-Me Towing, Inc.*, 782 F. Supp. 317, 320 (E.D. La. 1992).

The lease agreement between the parties determines plaintiff's rights in the facility and whether those rights are sufficient to give the plaintiff a proprietary interest in the facility. According to the terms of the lease agreement, IMTT provided to BP-NAP five storage tanks, one pipeline dedicated to transporting BP-NAP's products, and preferential barge access. IMTT retained exclusive control and administration of the tanks; reserved the right to refuse to accept or store material if it reasonably believed that the materials posed risks to other materials, storage facilities, or individuals; reserved the right to reject any vessel, barge, tanker, or rail tank car which it reasonably determined to be unsuitable for handling; and prohibited any sublease, transfer, or assignment of the lease by BP-NAP without IMTT's written consent.

The rights granted by the lease fall short of the possession and control necessary to constitute a "proprietary interest" in the facility. Plaintiff points to language by the Fifth Circuit which may suggest that a non-owner may recover economic losses in certain circumstances. *See, e.g., Texas Eastern Transmission Corp. v. McMoRan Offfshore Exploration*, 877 F.2d 1214, 1225 (5th Cir. 1989). However, I know of no case in which the Fifth Circuit has permitted a non-owner of property damaged by

a vessel to recover economic losses.[1] I conclude that *Robins Dry Dock* and its progeny in this circuit preclude plaintiff's recovery.

State Law

Plaintiff's claim is governed by maritime law, and maritime law precludes plaintiff's state law claim. Plaintiff argues that the Admiralty Extension Act, which applies here, does not displace state law remedies in a case in which the court also has jurisdiction based on diversity. The Fifth Circuit makes no distinction between "pure" admiralty jurisdiction and jurisdiction under the Admiralty Extension Act when applying admiralty law to the exclusion of state law. *Louisville & N.R. Co. v. M/V BAYOU LaCOMBE,* 597 F.2d 469 (5th Cir. 1979). "It matters not whether the collision be between vessels, or vessel and bridge, it is a maritime collision to which [maritime law] applies." *Empire Seafoods, Inc. v. Anderson,* 398 F.2d 204, 212 (5th Cir. 1968). The same principles of maritime law govern whether plaintiff's claim is brought in state court, on the law side of federal court, or under the court's admiralty jurisdiction. *Powell v. Offshore Navigation, Inc.,*

---

[1] The Fifth Circuit has allowed recovery of pecuniary losses related to damage to non-owned property by an owner of property also damaged by a vessel collision. *Domar Ocean Transportation, Ltd. v. M/V ANDREW MARTIN,* 754 F.2d 616 (5th Cir. 1985). The owner of a damaged tug recovered for loss of use of the tug and a barge which it did not own; the barge was under tow by the tug at the time of the collision. *Id.* at 617. The court concluded that the owner of the tug 'had a proprietary interest" in the tug and the barge "as a unit." *Id.* at 619 The decision does not expand the category of plaintiffs entitled to recover under *Robins Dry Dock;* it merely permits a proprietary plaintiff to recover fully for the damages sustained. Plaintiff, in the instant case, has no proprietary interest in any of the damaged property.

644 F.2d 1063, 1065 n.5 (5th Cir. 1981).

Plaintiff correctly points out that state law may sometimes supplement federal maritime law. However, state law may not conflict with federal maritime law so as to redefine the requirements or limit the recovery available in admiralty. *Id.* (citing *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1590 (1973); additional citations omitted)). The need for uniformity underlying much of maritime law applies equally to the rule formed in *Robins Dry Dock. M/V TESTBANK*, 752 F.2d at 1032. Plaintiff may not recover under state law what is explicitly denied in admiralty. "To permit recovery here on state law grounds would undermine the principles we seek to preserve today." *Id.*

9/28/92

/s/ Illegible
Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IMTT-GRETNA	CIVIL ACITON
VERSUS	NO. 91-174
SS ROBERT E. LEE, ETC., ET AL	SECTION "H"

CONSOLIDATED WITH:

BP NORTH AMERICA PETROLEUM, INC.	CIVIL ACTION
VERSUS	NO. 92-295
SS ROBERT E. LEE, ETC., ET AL	SECTION "H"

J U D G M E N T

Considering that counsel have advised the court that all claims of IMTT-Gretna have been settled; and considering the court's minute entry dated September 28, 1992, and further considering the court's directions as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that Civil Action No. 92-174 be and it is hereby dismissed, each party to pay its own cost.

DATE OF ENTRY OCT 7-1992

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, The SS Robert E Lee, her engines, Tackle, apparel and furniture, in rem, Waterman Steamship Corporation, and International Shipholding Corporation, in personam, and against BP North America Petroleum, Inc., dismissing plaintiff's suit with cost.

New Orleans, Louisiana, the 6th day of October, 1992.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

No. 93-0778

In The

Supreme Court of the United States

October Term, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackle, apparel and furniture, *in rem;*

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held that Petitioner failed to have a sufficient proprietary interest for the recovery of solely economic damages under the maritime law.

LIST OF PARTIES

Respondent, Midland Enterprises Inc., respectfully relies upon the List of Parties provided by Petitioner, BP North America Petroleum, Inc., in its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit except as amended below.[1]

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[1] Respondent, Midland Enterprises Inc., has no parent company or companies. The following entity represents a partially-owned subsidiary of Midland Enterprises Inc.: Lucy Marine Services, Inc.

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No. 93-0778

In The

Supreme Court of the United States

October Term, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackle, apparel and furniture, *in rem*;

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled;

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water; *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing

to the Federal agency owning or operating the vessel causing the injury or damage.

PRELIMINARY STATEMENT

Respondent, Midland Enterprises Inc. ("Midland"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the United States Court of Appeals for the Fifth Circuit's opinions in this case. The opinions have been reported at *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193 (5th Cir. 1993), and at *IMTT-Gretna v. Robert E. Lee SS*, 999 F.2d 105 (5th Cir. 1993).

COUNTERSTATEMENT OF THE CASE

This action arises out of alleged damages resulting from the S/S Robert E. Lee's allision on January 24, 1991, with a barge moored at a Mississippi River dock facility comprised of other barges anchored in the river. (R. at 242.)[2] Petitioner, BP North America Petroleum, Inc. ("BPNAP"), alleges that it sustained solely economic damages caused by physical damage to the dock facility owned by IMTT-Gretna in Gretna, Louisiana. (R. at 242-43.)

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[2] The references to the record by Respondent hereinafter pertain to Civil Action No. 92-0295 in the Eastern District of Louisiana unless otherwise noted.

The S/S Robert E. Lee, a vessel owned by Waterman Steamship Corporation ("Waterman"), is one of the largest cargo vessels navigating the Mississippi River. On January 24, 1991, this vessel departed the First Street Wharf in New Orleans, Louisiana, and proceeded upriver to commence a starboard turn that would ultimately permit her to travel southward out of the Mississippi River. Because of her size, this vessel takes up the entire navigable width of the river to effect such a turn.

The vessel navigated too closely to the west bank of the Mississippi River (that is, the right descending bank) during this turn and made contact with a barge moored at IMTT-Gretna's dock and in the tow of the M/V Thomas Hearndon. The S/S Robert E. Lee's master and pilot alleged that the M/V Gayle B, a vessel owned by Midland Enterprises Inc., failed to "hold up" sufficiently below the turning point and caused and/or contributed to the allision at issue. (No. 92-0174, R. at 259.) In the proceedings below, Midland vehemently denied such allegation. (No. 92-0174, R. at 258.) However, in any event, the S/S Robert E. Lee's allision with the barge only caused damage to the moored barges comprising the dock facility and a pipeline associated therewith. Petitioner did not own any of the property suffering physical damage as a result of the allision.

BPNAP and IMTT-Gretna had entered into an Agreement of General Conditions (the "Agreement") dated October 19, 1990, prior to this incident. (R. at 88, 177, 240.) The Agreement provided for storage of bulk liquids by BPNAP at IMTT-Gretna's facility. Furthermore, IMTT-Gretna provided BPNAP with a dedicated pipeline and

preferential barge access to one of the docks at the facility. IMTT-Gretna, however, retained exclusive ownership, control and administration of its Gretna facilities pursuant to the Agreement.

The record before the courts below also established a number of other undisputed material facts. First, in or about October 1990, BP Oil, the parent corporation of BPNAP, sold the facilities in question to IMTT-Gretna. (R. at 160.) Further, at the time of the allision, Petitioner, BPNAP, owned no equipment or other property at the Gretna facility (R. at 173.); nor did BPNAP sustain any loss of its bulk liquids being stored at this facility. (R. at 173-74.) In addition, no employees or representatives of BPNAP worked at IMTT-Gretna's facility on a day-to-day basis nor were any BPNAP employees present on the day of the allision. (R. at 159, 174.) BPNAP also did not insure (nor did it have an obligation to do so pursuant to the Agreement) the docking and storage facilities in question. (R. at 181.) IMTT-Gretna maintained and repaired the facilities at all pertinent times and paid for survey costs after the allision. (R. at 168, 177.) Finally, under the Agreement, BPNAP did not have any right or obligation to control the manner in which IMTT-Gretna managed and administered its facilities. (R. at 166.)

Petitioner instituted this action on January 23, 1992, against the S/S Robert E. Lee *in rem* and against Waterman Steamship Corporation ("Waterman") and International Shipholding Corporation ("International Shipholding") *in personam* in the United States District Court for the Eastern District of Louisiana, by filing a verified complaint. (R. at 240-47.) BPNAP filed suit to recover solely economic damages allegedly resulting

from the S/S Robert E. Lee's allision on January 24, 1991, with the barge moored at a Mississippi River facility owned by IMTT-Gretna.

The District Court thereafter ordered that this action be transferred and consolidated with a pending action entitled *IMTT-Gretna v. S/S Robert E. Lee, Waterman Steamship Corporation, and International Shipholding Corporation*, No. 92-0174 (E.D. La. Jan. 14, 1992). (No. 92-0174, R. at 234-36.) In the related action, IMTT-Gretna had filed suit on January 14, 1992, to recover damages including the cost of repairs to its facility, the loss of use during repairs, survey fees, and other incidental expenses allegedly resulting from the aforementioned allision. (No. 92-0174, R. at 283-87.) Subsequently, Waterman filed third-party complaints against Midland Enterprises Inc. *in personam* and the M/V Gayle B *in rem* seeking indemnification and contribution in both actions and, pursuant to Rule 14(c) of the Federal Rules of Civil Procedure, tendered these parties directly to the Petitioner. (No. 92-0174, R. at 243-55, 258-70.)

Midland filed answers in both actions to the third-party complaints and to the original complaints on March 30, 1992. (R. at 218-33.) In these answers, the Respondent denied liability in the premises. Furthermore, Midland asserted a cross-claim against Waterman seeking indemnification and contribution.

The District Court thereafter set trial to commence on October 14, 1992. (R. at 217.) On September 8, 1992, the S/S Robert E. Lee, Waterman, International Shipholding, and Midland filed motions for summary judgment on the issue of liability for BPNAP's damages. (R. at 130,

137-38.) After extensive briefing, the trial court granted the motions for summary judgment and dismissed BPNAP's claims against all parties. (R. at 256-60.) In so doing, the District Court held that the decisions in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) [hereinafter *Robins Dry Dock*], and in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986), precluded recovery of the damages being sought by BPNAP.

IMTT-Gretna settled its claims against the S/S Robert E. Lee, Waterman, and International Shipholding prior to trial. (R. at 251.) On October 6, 1992, the District Court granted a motion filed pursuant to Rule 41(c) of the Federal Rules of Civil Procedure to dismiss the third-party claims of Waterman against Midland and the M/V Gayle B. (R. at 252-54.) Consequently, the trial court entered a final judgment on the same date dismissing BPNAP's claims against the remaining parties. (R. at 251.) Petitioner, BPNAP, filed its Notice of Appeal from this judgment on November 2, 1992. (R. at 249.)

The Court of Appeals affirmed the judgment of the District Court on June 25, 1993. *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193, 1195 (5th Cir. 1993). In so doing, the court held that "[t]he district court correctly granted summary judgment in favor of defendants because of the appellant's lack of a proprietary interest." *Id.* at 1194. Furthermore, the Court of Appeals found that the District Court correctly refused to permit reliance by Petitioner on a state law remedy where the maritime law denied such a remedy. *Id.* Thus, the courts below agreed that Petitioner failed to demonstrate a sufficient proprietary

interest to defeat summary judgment and that the maritime law preempted any state law remedy asserted by BPNAP.

Petitioner thereafter sought to dismiss its state law claim for lack of subject matter jurisdiction. *See IMTT-Gretna v. Robert E. Lee SS*, 999 F.2d 105, 106 (5th Cir. 1993). Based on its alleged "discovery" at the appellate level, BPNAP contended that both the District Court and the Court of Appeals lacked jurisdiction to hear the state law claim because the parties failed to be diverse in citizenship. *Id.* On August 16, 1993, the Court of Appeals, however, held that the state law claim had been properly considered pursuant to federal maritime jurisdiction and that the Petitioner would not be afforded a "second bite" in a state court forum. *Id.* The court, therefore, denied the partial motion to dismiss and the petition for rehearing filed by BPNAP.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The courts below properly held that Petitioner failed to have a sufficient proprietary interest for the recovery of solely economic damages under the maritime law.

A. The courts below followed an unbroken line of authority.

The courts below followed an unbroken line of authority in denying recovery to the Petitioner in this case. For more than sixty-five years, the maritime law has

required the showing of a sufficient proprietary interest for the recovery of solely economic damages.[3]

The United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), held that a party may not recover in admiralty from a tort-feasor for a breach of contract resulting from physical injury by such tort-feasor to property belonging to another party. *Id.* at 308-09. *See generally* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 13-6, 13-7 (1987 & Supp. 1992) (discussing damages recoverable under *Robins Dry Dock*); Michael P. Sullivan, Annotation, *Robins Dry Dock Doctrine Limiting Recovery for Economic Losses Due to Unintentional Maritime Torts*, 88 A.L.R. Fed. 295 (1988 & Supp. 1993) (noting *Robins Dry Dock* precludes recovery absent physical injury to proprietary interest). In *Robins Dry Dock*, a vessel's time charterers sought to recover damages for the loss of use of a steamer caused by a tort-feasor's damage to its propeller. In denying recovery, the Court applied long-standing precedent to hold that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under contract with that other unknown to the doer of the wrong." *Robins Dry Dock*, 275 U.S. at 309; *see Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir.

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[3] Petitioner did not contest the validity of this principle in the proceedings below. This Court usually "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Thus, to the extent that Petitioner objects to the "proprietary interest" standard, it failed to preserve such objection for review on a writ of certiorari.

1985), *cert. denied*, 477 U.S. 903 (1986). Thus, having considered the clear import of the well-established rule applied in *Robins Dry Dock*, Petitioner did not attack its validity in the courts below but rather sought to escape the effect thereof.

The United States Court of Appeals for the Fifth Circuit directly confronted an invitation to abandon the *Robins Dry Dock* doctrine only eight years ago and declined to do so in an *en banc* decision. *See M/V Testbank*, 752 F.2d at 1020. In so doing, the Fifth Circuit remarked: "The principle that there could be no recovery for economic loss absent physical injury to a proprietary interest was not only well established when *Robins Dry Dock* was decided, but was remarkably resilient as well." *Id.* at 1023. The *Robins Dry Dock* and *M/V Testbank* cases represent applications of a well-established maritime law principle. Petitioner, however, sought to overcome such principle and recover solely economic damages arising out of physical injury to a third-party's dock facility.

The opinions rendered by the courts below followed this well-established, unbroken line of authority in applying the *Robins Dry Dock* rule to this case. Notwithstanding the Petitioner's protestations to the contrary, the Court of Appeals did not redefine the term "proprietary interest" to mean only actual ownership. In fact, the Fifth Circuit specifically followed prior precedent and noted the requirements for proprietary interest to be "actual possession or control, responsibility for repair and responsibility for maintenance." *Robert E. Lee SS*, 993 F.2d at 1194; *see Texas Eastern Transmission Corp. v. McMoran Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989). Petitioner, however, failed to

meet any of these criteria upon an examination of the undisputed record by the courts below. Thus, the District Court and the Court of Appeals properly found that no genuine issue of material fact existed over a proprietary interest in the property physically damaged by the S/S Robert E. Lee's allision.

The maritime law precludes recovery of economic damages by a party for injury resulting from physical damage to a third-party's property. No deviation from this long-standing principle of admiralty occurred in the courts below to warrant review by this Court.

B. The courts below properly granted summary judgment under the prevailing legal standards.

The courts below properly granted summary judgment and dismissed Petitioner's claims under the prevailing legal standards. Hence, even assuming *arguendo* that the Court of Appeals incorrectly required actual ownership of the damaged property, the Petitioner's arguments lack merit because the evidence failed to demonstrate physical injury to a proprietary interest.

Rule 56(c) of the Federal Rules of Civil Procedure provides that "judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a moving party satisfies the requisites of Rule 56(c), a motion for summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Finally, the substantive law determines materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Both the District Court and the Court of Appeals properly applied these standards in deciding this action.

The *Robins Dry Dock* decision and its progeny preclude recovery of economic damages absent physical injury to a proprietary interest. Under this rule, the undisputed record in the courts below established summary judgment to be proper because Petitioner lacked a sufficient proprietary interest in IMTT-Gretna's dock facility. Notwithstanding Petitioner's attempts to misconstrue the decisions rendered by the Court of Appeals, the factual record does not lend itself to a result in its favor. The record before the courts below demonstrated that, at most, Petitioner stored bulk liquids in tanks owned by IMTT-Gretna, was a customer of a dedicated pipeline belonging to IMTT-Gretna, and received preferential barge access for its vendor's barges at IMTT-Gretna's dock facility. These facts hardly establish a "proprietary interest" under any rational definition. Thus, pursuant to the *Robins Dry Dock* rule, the standards governing summary judgment supported the decisions reached by the District Court and the Court of Appeals.

The evidence in the courts below failed to demonstrate a sufficient proprietary interest under the proper

legal standards. No basis, therefore, exists to support the granting of a writ of certiorari to review such judgments.

C. No conflict between the circuits exists to warrant review by this Court.

The Fifth Circuit's decision fails to create a conflict between the circuits warranting review by this Court. In essence, Petitioner seeks to manufacture a conflict where none otherwise may be found.

The *M/V Testbank* and the *Robert E. Lee SS* decisions properly applied the "bright line" rule enunciated in *Robins Dry Dock* for recovery of economic damages under maritime law. Contrary to Petitioner's arguments, the Court of Appeals in this case failed to "change the face" of admiralty law or "sharpen" a conflict between the Fifth Circuit and the United States Courts of Appeals for the Second, Fourth, Sixth, and Ninth Circuits. In the first instance, the *M/V Testbank* court specifically reconciled the Second Circuit's holdings in *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) (hereinafter *Kinsman II*), with respect to foreseeability and the application of the *Robins Dry Dock* rule. *M/V Testbank*, 752 F.2d at 1025-26. In so doing, the Fifth Circuit stated: "*Kinsman II*'s general analysis of the problem, however, recognizing as it does the need for the imposition of limitations on recovery for foreseeable consequences of an act of negligence, is compatible with our own." *Id.* at 1026. Thus, as evidenced by the *M/V Testbank* opinion itself, a matter of form rather than true conflict exists between the Second and Fifth Circuits.

The allegedly conflicting opinions rendered by the Fourth and Sixth Circuits also provide no support to Petitioner's cause. In *Venore Transportation Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978), the Fourth Circuit permitted recovery by a time charterer of lost charter hire paid to a vessel's owner. *Id.* at 711. In so doing, the Fourth Circuit cited Fifth Circuit case law without disagreement but ultimately found the *Robins Dry Dock* rule to be inapplicable. *Id.* at 710. Furthermore, in *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the Sixth Circuit also failed to express (or even imply) disagreement with the approach to *Robins Dry Dock* taken by the Fifth Circuit some five years later in *M/V Testbank*. *Id.* at 447-49. Thus, no decisions rendered by the Fourth or Sixth Circuits conflict with the Fifth Circuit's application of the *Robins Dry Dock* rule in this case.

The Ninth Circuit provides the final decision relied upon by Petitioner in its attempt to create a conflict between circuits. In *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992), the court refused recovery to plaintiffs seeking damages in the form of increased prices for gasoline paid in the aftermath of the Exxon Valdez oil spill in Alaska. *Id.* at 806. The Ninth Circuit found it unnecessary to consider the *Robins Dry Dock* rule because proximate cause could not be reasonably established under the facts alleged. *Id.* at 808. In doing so, the court's decision lacks even a mention of the *M/V Testbank* decision or a discussion relevant to the present dispute. Furthermore, in *M/V Testbank*, the Fifth Circuit approved of the Ninth Circuit's policy on foreseeability expressed in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) [hereinafter *Union Oil*],

which opinion carved out an exception to the *Robins Dry Dock* rule for commercial fishermen. *See* 752 F.2d at 1025-27. The Ninth Circuit's opinions, therefore, fail to evidence any "conflict" with the decisions in this matter.

Petitioner's reliance on statutory laws further fails to establish any relevant conflict with the Court of Appeals in this matter. In its petition, BPNAP cites the Court to the following statutes: the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675; and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(4). By doing so, Petitioner evidently seeks to buttress its erroneous contention that the Court of Appeals somehow violated *Robins Dry Dock* in this case. Notwithstanding that none of these statutes applies to this matter, BPNAP fails to even cite any jurisprudence interpreting these statutes that conflicts with the application of the proprietary interest requirement by the Court of Appeals in this case. The Fifth Circuit's allegedly "incorrect reading" of *Robins Dry Dock*, therefore, fails to conflict with any relevant statutory law.

The Fifth Circuit in *M/V Testbank* specifically referred to the results reached by other courts in precluding recovery for purely economic losses. In so doing, the court stated:

> [T]he decisions of courts in other circuits convince us that *Robins Dry Dock* is both a widely used and necessary limitation on recovery for economic losses. The holdings in *Kinsman* and *Union Oil* are not to the contrary. The courts in both those cases made plain that restrictions on

> the concept of foreseeability ought to be imposed where recovery is sought for pure economic losses.

752 F.2d at 1027. Hence, the Fifth Circuit found these allegedly conflicting decisions to be reconcilable, if not in accord, with its own view of the *Robins Dry Dock* rule. In this instance, the courts below did not establish some new standard requiring actual ownership but rather relied on established requisites of proprietary interest. Hence, the Court of Appeals failed to create a conflict with the Second, Fourth, Sixth, and Ninth Circuits or any relevant statutory law.

A true conflict between the circuits or federal statutory law does not exist with respect to the decisions in this matter. Thus, the instant matter does not warrant review by the Court on this basis.

II. The courts below properly held that Petitioner may not recover purely economic damages under state law in this action.

A. The courts below properly held that the maritime law preempted Petitioner's state law claim.

The District Court and the Court of Appeals properly found that, in this instance, the admiralty law displaced and preempted state law. The courts below recognized that a contrary result would have compromised and conflicted directly with the long-established *Robins Dry Dock* rule.

The Fifth Circuit, in *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir.) (*en banc*), *cert. denied*,

409 U.S. 948 (1972), succinctly stated the maritime preemption test as follows:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

Id. at 818. *See generally* 2 C.J.S. *Admiralty* § 10 (1972 & Supp. 1993) ("A cause of action arising under the maritime law is governed by admiralty law principles and by federal substantive and procedural law.") The state law remedy sought by Petitioner directly conflicted with the *Robins Dry Dock* prohibition against recovery for economic loss absent physical injury to a proprietary interest. Hence, the application of Article 2703 of the Louisiana Civil Code or any other state remedy would have prejudiced a characteristic feature of admiralty and disrupted the harmony or uniformity of maritime law.

Petitioner's arguments regarding the alleged erroneous application of the Admiralty Jurisdiction Extension Act (the "Admiralty Extension Act"), 46 U.S.C. § 740, confuse jurisdiction with choice of law principles. *See generally* Joseph E. Edwards, Annotation, *Validity, Construction, and Application of Admiralty Jurisdiction Extension Act (46 USCS § 740)*, 14 A.L.R. Fed. 664, 673-74 (1973 & Supp. 1993) (noting general effect of Admiralty Extension Act). Specifically, the courts below found no distinction between jurisdiction under the Admiralty Extension Act

and "pure" admiralty jurisdiction when applying maritime law to the exclusion of state law. Petitioner, however, mischaracterizes these holdings by suggesting that the District Court and the Court of Appeals somehow used the Admiralty Extension Act to displace state law totally.

This Court's decision in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), evidently forms the basis of Petitioner's position but provides no support to its arguments—factually or legally. In *Askew*, the Court merely held "that sea-to-shore pollution--historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." *Id.* at 343. Prior to reaching such conclusion, the *Askew* court emphasized that "state regulation" must yield where a direct conflict with federal law exists. *Id.* at 341. The *Askew* facts, therefore, do not align with the facts at hand as a clear conflict with maritime law would occur through application of state law in this instance.

The District Court and Court of Appeals properly considered maritime choice of law principles and precluded application of state law remedies to this case. To permit Petitioner to assert a claim for economic damages under state law in this case would violate a long-standing and established admiralty principle.

B. The courts below properly exercised diversity jurisdiction over Petitioner's state law claim.

The record below established one crucial fact: Petitioner intended to sue and sued a New York corporation at the commencement of this lawsuit. Contrary to assertions that a Delaware corporation allegedly appeared in this action, the New York corporation has not been dismissed nor has any party moved to substitute the proper party-defendant. Moreover, the party over which BPNAP raises the instant dispute occupies the status of a holding company for Waterman Steamship Corporation and, hence, does not even represent a necessary party to this litigation. Respondent, therefore, submits that diversity jurisdiction existed at the time the District Court and the Court of Appeals ruled and continues to exist at this time.

C. The courts below properly exercised subject matter jurisdiction and considered Petitioner's state law claim even if diversity jurisdiction failed to exist.

Notwithstanding the existence or absence of diversity jurisdiction, the District Court and the Court of Appeals necessarily exercised admiralty jurisdiction over Petitioner's state law claim to decide the rights and liabilities of the parties. The arguments posed by BPNAP confuse jurisdiction with choice of law and the *power* of the federal courts to adjudicate matters within the admiralty jurisdiction.

The fact that diversity may have been alleged as an alternative basis of jurisdiction lacks relevance to the

substantive law applied by the courts below. In this respect, Professor Charles Wright has noted:

> If a claim based upon a maritime tort is asserted in a suit brought under the admiralty jurisdiction of the federal district courts, neither diversity of citizenship nor a minimum jurisdictional amount in controversy is required, and the fact that diversity jurisdiction also can be alleged as a basis of subject matter jurisdiction is of no moment. Moreover, both the procedural aspects and the substantive features of a maritime tort action under federal admiralty jurisdiction will be governed by federal law. As with other questions of subject matter jurisdiction, if "the factual findings regarding subject matter are intertwined with the merits," jurisdiction will be assumed unless the maritime basis for the claim is "immaterial or is wholly insubstantial and frivolous."

14 Charles A. Wright et al., *Federal Practice and Procedure* § 3676 (Supp. 1993) (footnotes omitted); *see Parker v. Gulf City Fisheries, Inc.*, 803 F.2d 828, 829 (5th Cir. 1986). This passage highlights the fact that the jurisdictional basis for a suit arising out of a maritime tort does not determine the federal court's power to decide the substantive law applied by it to such tort. Thus, the existence or absence of diversity in a case arising under admiralty jurisdiction lacks relevance in assessing whether a federal court retains power to decide state law issues arising out of a maritime tort.

Petitioner's fundamentally flawed position in the courts below did not comport with longstanding tenets of admiralty law. For years, the United States Supreme

Court has recognized that the rights and liabilities of litigants should not depend on the particular courthouse or the "side" of the same courthouse in which an action has been brought. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411 (1953). BPNAP "does not have the power to choose 'whether . . . liability shall be measured by common-law standards rather than those of the maritime law.' " *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 208 n.5 (1st Cir. 1988) (citing *Chelentis v. Lukenbach S.S. Co.*, 247 U.S. 372 (1918)). The Supreme Court in *Chelentis* noted:

> The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Chelentis, 247 U.S. at 384. Petitioner, therefore, lacked the prerogative to preclude a federal court in which it invoked jurisdiction from ruling that the maritime law controls the rights of the parties to the exclusion of state law.

The exercise of admiralty jurisdiction required the courts below to determine and to apply the substantive laws giving rise to the rights and liabilities of the parties. In deciding a case arising out of a maritime tort, a court properly and necessarily determines whether state law may be used to supplement the maritime law. *See Vessel Morning Star*, 457 F.2d at 818. Here, pursuant to admiralty jurisdiction, the District Court and the Court of Appeals needed to determine whether a right provided to lessees under state law directly conflicted with the maritime law. Thus, in this case arising out of a maritime tort, the controlling legal principles required the courts below to rule on Petitioner's state law claim regardless of the existence or absence of diversity.

The basic premise of and arguments raised by Petitioner lack legal support because the courts below properly exercised admiralty jurisdiction. In doing so, the District Court and the Court of Appeals necessarily passed upon questions of maritime *and* state law inextricably intertwined with the facts giving rise to this case and controversy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioner, BP North America Petroleum, Inc., should be denied.

Respectfully submitted,

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No. 93-778

In The

Supreme Court of the United States

October Term, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackles, apparel and furniture, *in rem;*

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the real issues for review are as follows:

1. Should the Supreme Court grant a Writ of Certiorari to review the Court of Appeals' conclusion that BP NAP lacked the requisite "proprietary interest" in the IMTT-Gretna facility to assert a claim for recovery of economic loss where BP NAP did not own, operate, mannor maintain the damaged facility and BP NAP merely contracted with IMTT-Gretna for the use of certain storage tanks and was afforded a dedicated pipeline and preferential berth at the dock?

2. Whether the rule of *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) and *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986), preclude recovery of damages for interference with contractual rights arising out of a collision between an oceangoing merchant vessel and a dock facility on a navigable waterway of the United States to the exclusion of any state law remedies?

3. Whether the Court of Appeals correctly exercised jurisdiction to decide plaintiff's state law claims where maritime jurisdiction, 28 U.S.C. § 1333 was uncontested and the claim arose out of a single incident – the collision of the S/S ROBERT E. LEE with a barge moored on the Mississippi River – on navigable waters in the United States?

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the District Court and Fifth Circuit Court of Appeals are contained in Petitioner's Appendix to its Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those contained in Petitioner's Appendix.

INTRODUCTION

Petitioner's brief incorporates virtually the same arguments unsuccessfully advanced by BP North America Petroleum, Inc. ("BP NAP") in the district court in September of 1992 (Appendix D at A-13), in the Fifth Circuit Court of Appeals (see Decision rendered June 25, 1993, affirming the District Court's findings and conclusions in all respects, Appendix A at A-3), on Petition for Rehearing before the Fifth Circuit, which was denied on August 16, 1993 (see Appendix B at A-7) and finally on BP NAP's Partial Motion to Dismiss filed at the appellate level and which was rejected by the Fifth Circuit on August 16, 1993 (see Appendix C at A-9). Since the arguments advanced by BP NAP in its Petition have been exhaustively considered and rejected on three separate occasions by the United States Fifth Circuit Court of Appeals, Respondents, Waterman Steamship Corporation ("Waterman") and International Shipholding Corporation ("International") submit that no worthwhile purpose would be served by responding in detail to BP NAP's lengthy Petition. The flaws in BP NAP's Petition are

obvious. Nevertheless, since BP NAP's petition is misleading, both factually and legally, Respondents respectfully respond to those contentions which are legally erroneous and lack evidentiary support in the record.

STATEMENT OF THE CASE

On January 24, 1991, the S/S ROBERT E. LEE was maneuvering to turn down-bound near Mile 97 of the Mississippi River when its starboard stern came into contact with part of the IMTT-Gretna dock facility. The ROBERT E. LEE came into contact with the No. 2 dock barge.

Approximately four months prior to the collision, IMTT-Gretna and BP NAP entered into an Agreement of General Conditions dated October 19, 1990, which was in effect on the date of the collision. (R: 177)[1] Pursuant to this Agreement of General Conditions, BP NAP was afforded the use of storage tanks for bulk liquids, provided the use of a dedicated pipeline to transfer bulk liquids and was provided preferential, though not exclusive, barge access to one of the dock barges comprising the IMTT-Gretna dock facility. (R: 164-165)

The fact that IMTT-Gretna retained all indicia of ownership of the storage facility pipeline and dock

[1] All citations refer to Volume One of the Record and are taken from the deposition of Loy Dean Purcell, the 30(b)(6) representative of BP NAP.

barges is confirmed by the Agreement of General Conditions. Paragraph 1 of the Agreement of General Conditions provides in pertinent part:

> [IMTT] hereby leases and lets unto [BP NAP] and [BP NAP] hereby rents and hires from [IMTT] for the purpose of storage only during the term of this Agreement, the storage tank(s) listed in the attached schedule(s) **provided that [IMTT] shall retain exclusive control and administration of said tank(s) including all throughput in or out thereof, and all premises, lines and appurtenances appertaining thereto**. . . . (emphasis added)

Paragraph 3 of the Agreement of General Conditions further states in relevant part:

> . . . [IMTT] reserves the right to refuse to accept or store or continue to store the materials or any part thereof, if in its opinion the condition of the materials gives reasonable ground for apprehension of loss or damage to other goods or to storage facilities or to any person or persons whatsoever . . .

Paragraph 13 of the Agreement of General Conditions also provides in pertinent part:

> [IMTT] reserves the right to reject any vessel, barge, tanker, rail tank car or tank truck, or any material contained therein, which it reasonably determines to be unsuitable for handling or in bad order, without liability whatever on the part of [IMTT] to [BP NAP] for any loss, damage, demurrage or expense, consequential or remote, sustained by [BP NAP] as a result of such rejection.

It is undisputed that BP NAP did not sustain a loss of any of its bulk liquid products that were stored at the IMTT-Gretna dock facility. (R: 173-174). Further, BP NAP did not have any equipment on the premises of the IMTT-Gretna dock facility and accordingly sustained no physical damage to any of its equipment as a result of the collision. (R: 173,176) BP NAP did not arrange for any surveys of the damaged IMTT-Gretna dock facility and did not effect any repairs to the facility caused by the collision. (R: 177) Moreover, BP NAP had no obligation to insure, nor did it insure, the IMTT-Gretna dock facility for the damage sustained by the dock as a result of the collision. (R: 181)

BP NAP had no employees or representatives at the IMTT dock facility on January 24, 1991, and as a general rule, did not have any employees or representatives present on a daily basis. (R: 159,174) BP NAP had no right to prevent IMTT-Gretna from servicing a competitor of BP NAP at the IMTT-Gretna facility (R: 190) nor did BP NAP have the right to fire an IMTT-Gretna employee working at IMTT's facility whom BP NAP believed to be working in an unsafe manner. (R: 190) Finally, BP NAP had no right to require IMTT-Gretna to change the make up of its dock facility consisting of dock barges, pipelines and fixed structures. (R: 190)

Reduced to its lowest common denominator, the undisputed facts establish that IMTT-Gretna owned, operated, manned and maintained the facility in question consisting of shore side storage tanks and pipelines connecting the storage tanks to a dock in the Mississippi River. BP NAP merely contracted with IMTT-Gretna on an annual basis for the use of certain storage tanks and

was afforded use of a dedicated pipeline and use of a preferential berth at the dock which was available to and used by other IMTT customers.

The IMTT dock sustained physical damages which were repaired by IMTT and for which IMTT brought suit against the S/S ROBERT E. LEE, *in rem* and against Waterman and International *in personam*. The damage claim of IMTT was settled by Waterman. BP NAP filed a separate suit against the S/S ROBERT E. LEE, *in rem* and against Waterman and International *in personam* to recover damages for economic losses associated with interference of its contractual rights that resulted from the collision between the S/S ROBERT E. LEE and the IMTT-Gretna dock facility. BP NAP claimed lost profits allegedly resulting from its diminished ability to receive and deliver bulk liquids from the IMTT-Gretna facility pursuant to the Agreement of General Conditions entered into between IMTT-Gretna and BP NAP.

On September 8, 1992, Respondents filed motions for summary judgment based on the rule of law set forth in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), and followed in *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271 (1986). Respondents based their motions for summary judgment on the allegations of BP NAP's Complaint, the contractual Agreement of General Conditions between BP NAP and IMTT-Gretna, and the course of conduct between BP NAP and IMTT-Gretna as set forth in the 30(b)(6) deposition of BP NAP's representative, Loy Purcell.

On September 28, 1992, the district court issued a Minute Entry with written reasons wherein it granted Respondents' Motion for Summary Judgment dismissing the claim of BP NAP. On October 7, 1992, the Court entered a separate judgment in favor of Respondents and against BP NAP. BP NAP appealed the District Court's decision and the Fifth Circuit affirmed. BP NAP thereafter petitioned the Fifth Circuit for a rehearing but that Petition was denied. In a desperate attempt to relitigate its claim in state court, BP NAP filed a Partial Motion to Dismiss Without Prejudice its state law claim in the Fifth Circuit; however, Petitioners' Motion was denied by the Court on August 16, 1993.

SUMMARY OF ARGUMENT

In 1986 this Court denied a petition of certiorari in *TESTBANK*, where the very same issues were raised and the very same arguments were advanced. The weakness of BP NAP's argument is directly proportionate to the length of its argument.

The rule of law under *Robins* and *TESTBANK* is both well settled and clearly defined: negligently inflicted injuries to purely economic interests – in the absence of physical damages to a proprietary interest – are not compensable as a matter of law. As the Fifth Circuit has explained: "the law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved." *Dick Meyers Towing Service,*

Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978), cert. den., 440 U.S. 908, 99 S.Ct. 1215 (1979).

The District Court correctly dismissed BP NAP's Complaint for Damages on the basis that it lacked an indispensable prerequisite for recovery – a "proprietary interest" in the damaged property. The record is replete with uncontroverted testimony which supports this finding. BP NAP's 30(b)(6) representative, Loy Dean Purcell clearly established that it was IMTT-Gretna – through the express provisions of the Agreement of General Conditions as well as the day-to-day operation of the dock facility – who exercised real rights of ownership over the dock facility.

Paragraph 1 of the Agreement of General Conditions expressly negated BP NAP's claim that it rather than IMTT-Gretna, exercised control and possession over the damaged property:

> [IMTT] shall retain exclusive control and administration of said tank(s) including all throughput, in or out thereof, and all premises, lines and appurtenances appertaining hereto.

BP NAP representative, Loy Purcell testified that:

(a) The dock facility was owned exclusively by IMTT-Gretna;

(b) The dock facility was operated exclusively by IMTT-Gretna;

(c) The dock facility was maintained exclusively by IMTT-Gretna;

(d) BP NAP had no employees or representatives at the IMTT-Gretna dock on the date of the collision and as

a general rule, did not have any employees present on a daily basis. BP NAP's contract with IMTT-Gretna simply afforded it use of certain storage tanks, a dedicated pipeline and a preferential berth which was available to and used by other customers. Thus, the course of conduct between the parties at the IMTT-Gretna facility combined with the express provisions of the Agreement of General Conditions foreclose BP NAP's assertion of "proprietary interest."

BP NAP's argument for the application of state law, to say the least, is not well founded. First, BP NAP made a Rule 9(h) designation in its Complaint: "Numerous and important consequences flow from whether a district court treats a case as falling under admiralty or diversity jurisdiction." *T.N.T. Marine Service v. Weaver Shipyard & Dry Docks, Inc.*, 702 F.2d 585, 586 (5th Cir.), cert. den. 464 U.S. 847, 104 S.Ct. 151 (1983). In short, BP NAP's claim is treated as one in admiralty by the Rule 9(h) identifying statement. Respondents submit and the Fifth Circuit agreed that the application of state law theories that are wholly inconsistent with *Robins* and the general maritime law would only serve to undermine principles of maritime uniformity which have developed over several decades as well as eradicate "the brightline" that *Robins* offers "in an otherwise murky area," and for those reasons rejected its application. *Mathiesen v. M/V OBLIX*, 817 F.2d 345, 346 (5th Cir.), cert. den. 484 U.S. 898, 108 S.Ct. 234 (1987). After all, this claim arises out of a collision between a vessel and dock on a navigable waterway of the United States.

BP NAP's attempt to ressurect its state law claim in a subsequent state proceeding, was properly rejected by the

Fifth Circuit. The Fifth Circuit had uncontested subject matter jurisdiction over Petitioner's entire claim as a consequence of the general maritime law. 28 U.S.C. 1333. Since the Court's maritime jurisdiction was not "immaterial" it had jurisdiction to adjudicate the entire dispute.

In sum, BP NAP's claim for recovery of economic loss is both factually and legally without merit and the Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. The Court of Appeals Decision is Consistent With This Court's Pronouncement in *Robins Drydock* And Its Progeny.

The present claim involves a collision between a vessel and a dock facility on the Mississippi River, a navigable waterway of the United States; and accordingly, BP NAP's claim and alleged damages are within the admiralty and maritime jurisdiction of the federal courts. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 504, 34 L.Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982); *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed. 2d, 292 (1990). The existence of federal admiralty jurisdiction results in the application of federal admiralty law to the exclusion of state law. *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961); *Freeport Sulphur Co. v. S/S HERMOSA*, 526 F.2d 300 (5th Cir. 1976). As the Fifth Circuit noted in *TESTBANK*:

> . . . the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here . . . To permit recovery here on state law grounds would undermine the principles we seek to preserve today. Accordingly, we decline to adopt plaintiff's state law claims as theories of recovery.

752 F.2d at 1032.

This Court's denial of certiorari in *TESTBANK* in 1986 confirms that this well-settled principle of law is beyond question.

As the following authorities clearly demonstrate, maritime law precludes BP NAP from recovering damages for negligently inflicted economic losses when effective ownership of the damaged property is vested in another, i.e. IMTT-Gretna. *Robins Drydock & Repair Co., supra; M/V TESTBANK, supra; Louisville & Nashville Railroad v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979); *Vicksburg Towing Co. v. Mississippi Marine Transportation Co.*, 609 F.2d 176 (5th Cir. 1980); *Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978), cert. den. 440 U.S. 908, 99 S.Ct. 1215 (1979); *Mathiesen v. M/V OBELIX*, 817 F.2d 345 (5th Cir.), cert. den. 484 U.S. 898, 108 S.Ct. 234 (1987); *Naviera Maersk Espana v. Cho-Me Towing, Inc.*, 782 F.Supp. 317 (E.D. LA 1992).

The seminal case to address the issue of recovery of economic loss resulting from an unintentional tort in a maritime cause of action is *Robins Drydock & Repair Co., supra*. In *Robins*, the plaintiff-time charterers of a vessel sued the defendant dry dock company for lost profits allegedly occasioned by the defendant's negligence in

repairing the damaged ship's propeller. At the time of the damage, the vessel was laid up for regular repairs; the damage to the propeller required the ship to remain in dry dock an extra two weeks. The time charterers sought to recover for loss of use of the vessel during this two week period.

The United States Supreme Court held that the time charterers had no claim for lost profits against the dry dock:

> Plaintiffs' loss arose only through their contract with the owners – and while intentionally to bring about a breach of contract may give rise to a cause of action . . . no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.

75 U.S. at 308-09, 48 S.Ct. at 135-136.

The United States Supreme Court noted that the plaintiff-time charterers had no property interest in the vessel and that the time charterers did not even have "possession" of the vessel at the time of the tort. Thus, the rule enunciated in *Robins* which has been consistently followed in subsequent cases is that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime torts." *TESTBANK*, 752 F.2d at 1020. As the Fifth Circuit has noted, "Although eloquently criticized for its rigidity, the [*Robins*] rule has persisted because it offers a brightline

application in an otherwise murky area." *Mathiesen*, 817 F.2d at 346.

The determinative issue in this case, correctly decided by the Court of Appeals, is whether BP NAP had a sufficient "proprietary interest" in the IMTT-Gretna dock facility at the time of the collision. In making such a determination, the Fifth Circuit has emphasized that "the critical factor is the character of the interest harmed." *Dick Meyers Towing*, 577 F.2d at 1025. Proprietary interest has been defined "to mean that a party must have control over the property tantamount to full ownership." *Naviera*, 782 F.Supp. at 320. In *TESTBANK*, this Court explained:

> We asserted that the distinction between recovery by an *owner* when its property was damaged and *recovery by others* as applied in *Robins, Dick Meyers [Towing Service, Inc. v. U.S.*, 577 F.2d 1023 (5th Cir. 1978)] and M/V BAYOU LACOMBE was 'meaningful, real and dispositive.' (citations omitted) (emphasis added). *Id.* at 1024.

The Court of Appeals determined that BP NAP lacked sufficient proprietary interest in the IMTT-Gretna dock to assert a claim for damages. BP NAP exercised none of the rights associated with effective ownership of property. It neither owned, operated, maintained, insured nor controlled the IMTT-Gretna dock facility in any manner. By contract, as well as by its conduct at the IMTT-Gretna dock facility, IMTT-Gretna retained "exclusive control and administration" of the dock facility.

Recent Fifth Circuit decisions illustrate the point that a "right of use" – without more – does not suffice to show "proprietary interest." In *Louisville & Nashville Railroad v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979), the

plaintiff-railroad brought an action for damages pursuant to the Admiralty Extension Act, 46 U.S.C. § 740 (1975). The district court found that the railroad could not recover for loss of use of a bridge which the defendant-vessel had damaged. The railroad argued that it had a long-standing contractual right to use the bridge and that this right constituted an "easement." It further argued that since an easement was a "property interest," *Robins Drydock* did not bar its claim.

In rejecting the plaintiff's argument, the Fifth Circuit held that even if plaintiff's right to use the bridge constituted an "easement," that interest was insufficient and would not give rise to a right of recovery. The critical point was that plaintiff's interest did not include possession or control of the bridge:

> It is clear that the plaintiffs' right to use the bridge has none of the incidents of ownership . . . that would justify recovery for damage to physical property . . . Louisville & Nashville never had possession or control of Southern's property . . . The bridge is maintained entirely by Southern's employees; Louisville & Nashville had no obligation to repair the bridge or contribute to the cost of repairs in the event of damage by a third party; indeed, we note that Oil Transportation has already paid Southern for the physical damage to the bridge. *Thus, whatever label may be attached to the plaintiff's right to use the bridge, at bottom, the damage to the bridge caused Louisville and Nashville to suffer the loss of an economic expectancy and not a proprietary loss. Robins* and the cases in this circuit following *Robins*, compel us to deny recovery for that loss. (emphasis added)

597 F.2d at 474.

Likewise, under the facts of the instant case, BP NAP's right of use does not include incidents of effective ownership which would justify a recovery here. BP NAP did not own, man, operate or maintain the IMTT-Gretna facility in any manner. Moreover, the physical damages to the IMTT-Gretna facility, after being surveyed by IMTT-Gretna, were repaired by IMTT-Gretna. The defendants also paid IMTT-Gretna, not BP NAP, for the cost of repairs to the facility.

In *Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980), plaintiff was the **owner** of a barge unloading facility and had leased that facility to another party. The lease provided that responsibility for repairs remained with the lessee with an abatement of rent during repairs. Defendant's vessel negligently damaged the facility. Defendant contended that the *Robins* doctrine prevented the lessor-owner's recovery of lost rent because it had contracted away its right to such rent and therefore it did not have a sufficient protected property interest.

The Fifth Circuit rejected defendant's argument and did not deny recovery on the basis of *Robins* because "the plaintiff here is the owner of the damaged property. It has an insurable interest. . . . It has all of the elements of ownership which attach to a freehold interest . . . " *Id.* at 177. The Court went on to note that in *Robins* and *BAYOU LACOMBE*, the plaintiff's interest in the damaged property was less than full ownership. The Court noted that the difference between full ownership and something less for purposes of *Robins* "is meaningful, real and dispositive." *Id.* See also, *Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY*, 614 F.Supp. 890 (E.D. PA 1985)

(joint user of property cannot recover damages when effective ownership of property is vested in another.)

BP NAP mistates the holding of the Fifth Circuit in contending that it erroneously interpreted "proprietary interest" to mean actual ownership; a cursory review of the Fifth Circuit's opinion proves otherwise:

> [BP NAP], fully appreciating the road blocks set by *Robins* and *TESTBANK* argues at length that it has a proprietary interest in the dock. BP NAP argues that only their products were allowed in the pipelines they leased and that they had preferential docking rights at the damaged berth. The Fifth Circuit states that the requirements for proprietary interest are actual possession or control, responsibility for repair and responsibility for maintenance. (citations omitted) BP NAP fails to meet any of the criteria. It certainly did not own any of the property and IMTT-Gretna maintained the right to refuse BP NAP access to the leased pipelines if it felt that the liquids being pumped could be harmful to others or to the pipeline. The appellant's use of the dock and pipelines was valid only for the term of the lease. BP NAP did not have control of the property. It did not repair or had the responsibility to repair the damage. It did not station any employees at the dock so it clearly did not maintain the facility. The district court correctly found that no issue of proprietary interest existed that could have prevented the granting of summary judgment against BP NAP.

993 F.2d at 1194.

Accordingly, the Fifth Circuit rejected BP NAP's claim because it lacked sufficient indicia of ownership in

the IMTT-Gretna dock, not because it lacked actual title to the property.

a. BP NAP Feebly Attempts to Create a Circuit Conflict Where None Exists.

Short work can be made of BP NAP's claim that the brightline rule of *Robins* is in conflict among the Federal circuits. The rule of *Robins* was recently upheld by this Court's denial of certiorari in *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986).

BP NAP cites four decisions from other Federal circuits in support of its contention that "a serious conflict" exists between the Fifth Circuit and other circuits with respect to interpretation of *Robins*. The four cases cited by BP NAP are wholly consistent with the principle enunciated in *Robins* and are distinguishable both legally as well as factually from the present case. As a matter of fact, the Fourth Circuit Court of Appeals in *Venore Transportation Co. v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), emphasized its adherence to the rule of *Robins*:

> In *Robins Drydock*, Mr. Justice Holmes wrote broadly, as he customarily did, but there is no inconsistency in our holding and that of the Supreme Court in *Robins Drydock*. Nor do we enlarge in any way the types of damages which have been traditionally recoverable nor the offending vessel's obligation of recompense.

Id. at 711.

Thus, in *Venore*, the Fourth Circuit allowed the plaintiff to recover damages for loss of use of the vessel while

denying the time charterer recovery of "lost profits." Moreover, *In Re: Bethlehem Steel Corp. v. Marriott Corp.*, 631 F.2d 441 (6th Cir. 1980), the Sixth Circuit interpreted the rights of the parties under the Canada Shipping Act and applied Canadian substantive law regarding the party's right to recover damages. Accordingly, the decision is not in conflict with United States general maritime law.

BP NAP cannot assert a good faith argument that *Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968), is in conflict with the rule of *Robins*. The *Kinsman* decision is clearly consistent with and cites *Robins* as authority for its holding:

> "The law does not spread its protection so far." Holmes, J., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135.

Kinsman, 388 F.2d at 825.

Finally, *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992), is clearly distinguishable from the present case. In *Benefiel*, plaintiffs sought recovery for damages under the Trans-Alaska Pipeline Authorization Act. In denying plaintiff's recovery, the Ninth Circuit expressly noted:

> We do not need to reach the specific issue of *Robins Dry Dock* abrogation, for we are confident that Congress in enacting TAPAA did not intend to abrogate all principles of proximate cause.

959 F.2d at 807.

II. Federal Admiralty Law Controls Disposition of Case to the Exclusion of State Law Remedies.

It is well settled that the invocation of federal admiralty jurisdiction results in the application of federal admiralty law rather than state law. *TESTBANK, supra; Kossick, supra; Freeport Sulphur Co., supra.* In its Complaint, BP NAP invoked Rule 9(h) as its jurisdictional statement and is now foreclosed from asserting state law under any other jurisdictional basis. *T.N.T. Marine Service v. Weaver Shipyard*, 702 F.2d 585 (5th Cir. 1983). The Fifth Circuit in *T.N.T. Marine Service* explained:

> The availability of certain maritime remedies . . . depends on the source of jurisdiction as well. . . . Other aspects of substantive law would vary as well, since state law applies to diversity suits under the *Erie* doctrine, while federal common law governs admiralty suits.
>
> * * *
>
> The plaintiff may elect to have a suit treated as either a diversity or admiralty suit, ***each option having advantages and disadvantages, but the plaintiff's case will be treated as one in admiralty 'by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.'***

T.N.T. Marine Service, 702 F.2d at 587. It is clear that BP NAP made a 9(h) designation and did not withdraw or amend its designation prior to judgment against it. Accordingly, BP NAP cannot now claim the benefit of state law remedies.

Recognizing that it has no claim for economic loss without physical damage to a proprietary interest under the general maritime law and in an effort to circumvent the well-established rule of *Robins*, BP NAP also alleged in its Complaint that it was entitled to recover damages for economic loss pursuant to Louisiana law. In particular, BP NAP alleged entitlement to damages under Article 2703 of the Louisiana Civil Code; however, BP NAP's reliance on Louisiana state law is misplaced.

The Fifth Circuit in *TESTBANK* emphasized:

> . . . the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here . . . to permit recovery here on state law grounds would undermine the principles we seek to preserve here today. Accordingly, we decline to adopt plaintiff's state law claims as theories of recovery.

752 F.2d at 1032.

In rejecting BP NAP's state law argument, the Court of Appeals succinctly noted:

> Maritime law specifically denies recovery to non-proprietors for economic damages. To allow state law to supply a remedy when one is denied in admiralty which serve only to circumvent the maritime law's jurisdiction.

993 F.2d at 1195.

a. The Admiralty Extension Act Does Not Save the Day for BP NAP.

It is well settled that the Admiralty Extension Act, 46 U.S.C. § 740 (1975) does not create new causes of action, but rather expands the locality rule of admiralty jurisdiction to encompass "ship-to-shore" torts. *M/V BAYOU LACOMBE*, 597 F.2d at 472. The legislative history behind the Act shows that it was designed to eliminate anomalous and unfair results that could and did flow from adjudicating collision cases according to different and conflicting legal principles. See *Sen. Rep. No. 1593, 80th Congress, 2nd Section*, reprinted in 1948 U.S. Code Con. Serv. 1898; 7(A) *Moore's Federal Practice and Procedure* at 3580-3581 (1983). As one court has noted "it is clear that it was the central purpose of the Admiralty Extension Act to bring all claims in such situations under the uniform application of the general maritime law." *Palumbo v. Boston Towboat Co., Inc.*, 487 N.E. 2d 546, 548 (Mass. App. Ct. 1986). The Federal courts have consistently applied the general maritime law to the exclusion of state law in cases brought under the Admiralty Extension Act. *M/V BAYOU LACOMBE, supra; Palumbo, supra.*

Respondents respectfully submit that BP NAP misreads *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 2d 280 (1973). In *Askew*, the plaintiff argued for the application of Florida legislation imposing strict liability for both clean up costs and damages in cases of oil spills in territorial waters. While the Court in *Askew* rested its decision primarily on "the police power of the States over oil spillage," the case also involved application of the Federal Water Quality

Improvement Act of 1970, 33 U.S.C. § 1161(o) (1970), which made explicit that Federal policy was to permit States to legislate with respect to oil spills in their territorial waters. 93 S.Ct. at 1593. The present case, however, deals with principles governing liability for collisions between vessels and land based structures, not responsibility for oil spill response costs; accordingly, the need for uniformity of general maritime law demands its application to the exclusion of state law.

III. Court of Appeals Had Jurisdiction Under 28 U.S.C. 1333 to Adjudicate Entire Controversy Including State Law Claim.

Contrary to the assertions of BP NAP, its alternative federal and state law claims are merely different "counts," "grounds," or "theories" of recovery in support of what is essentially a single claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); see also, *Practice Commentary* by David D. Siegel, 28 U.S.C.A. § 1367 at p. 240 (1993) (cumulative pocket parts). Whether diversity jurisdiction exists is of no moment because the trial court's determination that state law did not supply an alternative remedy to BP NAP is inherent in the Court's exercise of maritime jurisdiction over this traditional maritime collision case. 28 U.S.C. § 1333. BP NAP cannot seriously argue that neither the District Court nor the Fifth Circuit was vested with subject matter jurisdiction over any and all claims arising from the "common nucleus of operative facts" of the ROBERT E. LEE's collision with the IMTT-Gretna dock facility. *Carnegie v. Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct.

614, 98 L.Ed. 2d 720 (1988); *United Mine Workers v. Gibbs, supra.*

It is now statutorily recognized that Federal courts may exercise supplemental jurisdiction over a case where Federal jurisdiction otherwise exists. See 28 U.S.C. § 1367 (doctrines of ancillary and pendent jurisdiction combined into supplemental jurisdiction). In *Gibbs*, this Court stated:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the laws of the United States and treaties made, or which shall be made under their authority . . . " U.S. Constitution, Article III, Section 2.
>
> And the relationship between that claim and the State claim permits the conclusion that the entire action before the Court comprises but one consitutional "case." The Federal claim must have substance sufficient to confer subject matter jurisdiction on the Court . . . the State and Federal claims must derive from a common nucleus of operative fact. But, considered without regard to their Federal or State character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the Federal issues, there is power in Federal courts to hear the hold.

Id. at 725.

The *Gibbs* opinion clearly mandates that claims deriving "from a common nucleus of operative fact" be tried in a single proceeding. Here, BP NAP initiated an action pursuant to the Federal Courts admiralty jurisdiction and

asserted a cause of action based on state law. Accordingly, the District Court clearly had jurisdiction to entertain all theories of recoveries advanced by BP NAP.

CONCLUSION

There is no conflict among the Circuits and there is absolutely nothing whatsoever in the instant Petition which requires this Court's attention. The Fifth Circuit's decision is in complete harmony with this Court's decision in *Robins* and its progeny, *M/V TESTBANK*. Where a petition for certiorari was likewise denied. BP NAP's Petition is devoid of merit and should also be denied.

DATED this 15 day of December, 1993.

Respectfully submitted,

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